

Qatari Court of Cassation Thickens the Fog on the Heels of the New Qatari Arbitration Law

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In a recent judgment, the Qatari Court of Cassation ruled that an arbitral tribunal may only hear a dispute arising from a contract that is valid and that the validity of a contract is to be determined solely and exclusively by the courts (Civil Appeal No. 65-2017). Notably, the judgment was issued on 18 April 2017 just days after Qatar's new Arbitration Law, Law No. 2 of 2017 ("Qatari Arbitration Law") came into effect on 12 April 2017, yet the judgment appears to stand in stark contrast with two internationally accepted principles enshrined in the Qatari Arbitration Law: competence-competence and separability of the arbitration clause.

Case Facts

The claimant, a contractor, had entered into four agreements with the defendant consultant, appointing the latter to represent and provide services on behalf of the claimant in relation to a large project for the execution of numerous works for which the defendant received approximately 111.5 million Qatari Riyals (approximately USD 30.6 million). The claimant filed a case before the Qatari Court of First Instance against the defendant for the invalidation of the four agreements on the basis that the defendant did not possess the required license for performing the contractual works, which constitutes a breach of mandatory provisions under

Qatari law.

Court of First Instance

The defendant argued that the case should be dismissed by virtue of an arbitration clause contained in the signed agreements. The Court of First Instance accepted the defendant's argument and dismissed the case on the basis of the existing arbitration clause.

Court of Appeal

The claimant appealed the judgment of the Court of First Instance to the Court of Appeal, which upheld the judgment.

Court of Cassation

The claimant appealed to the Court of Cassation. The appeal was based on the claimant's submission that the action was wrongly dismissed by the Court of First Instance and the Court of Appeal since the relief sought was the invalidation of the four agreements for being contrary to public policy. In particular, the claimant argued that the agreements were entered into and performed by the defendant unlawfully in violation of public policy by virtue of the defendant not having the requisite license and that matters of public policy were for the courts, and not arbitral tribunals, to determine.

The Court of Cassation granted the appeal. According to the Court of Cassation, any claim involving the invalidity of a contract (and restoration of the parties to the position they were in prior to the contract) implicates a matter of public policy. In reaching this sweeping conclusion, the Court of Cassation stated (as translated) that:

"[i]t is unimaginable that the arbitral panel may consider the dispute arising from the agreement without there being certainty that the agreement itself is valid, and such determination on the validity of the agreement is solely and exclusively for the judicial courts to consider and rule upon. If the appeal judgment contains a decision that is contradictory to such, then such judgment is subject to appeal by Cassation."

It thus appears that the Court of Cassation is of the view that the Qatari courts have exclusive jurisdiction over questions of contract validity and that such jurisdiction is exercisable in advance of an arbitral tribunal's determination on (1) its own jurisdiction and (2) a contract's substantive validity.

The Effect of the Judgment - A Striking Contradiction to the Qatari Arbitration Law?

The Court of Cassation's judgment, which was unexpected in light of the recent introduction of the Qatari Arbitration Law, appears to be inconsistent with the familiar notions of competence-competence and separability of the arbitration clause, which are contained in the new law and well established internationally.

These principles are enshrined in Article 16 of the Qatari Arbitration Law, which is almost identical to its counterpart in Article 16 of the UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL Model Law"). Article 16 of the Qatari Arbitration Law provides that

"[t]he Arbitral Tribunal shall decide in respect of the plea raised questioning its jurisdiction to entertain the dispute, including those grounded on absence, invalidity, nullity, revocation or irrelevancy of the Arbitration Agreement to the subject matter of the dispute. The Arbitration clause shall be treated as an agreement independent from the other conditions provided for in the contract. The nullity, rescission or termination of the contract shall not affect the arbitration clause, provided that such clause is valid per se."

Thus, Article 16 incorporates the doctrine of competence-competence by providing that an arbitral tribunal may rule on its own jurisdiction in the first instance. Indeed, this provision in the Qatari Arbitration Law, which provides that a tribunal "shall" determine its own jurisdiction, goes even farther than Article 16 of the UNCITRAL Model Law, which provides that a tribunal "may" make this determination.

Article 16 of the Qatari Arbitration Law likewise incorporates the doctrine of separability by making it clear that, even though an arbitration clause may be contained within a broader substantive contract between parties, it is nevertheless considered a separate agreement. As such, the arbitration clause may (and, most of the time, will) continue to be valid even though the substantive contract within which the arbitration clause is contained is found to be invalid. This enables an arbitral tribunal to decide a dispute even if the substantive contract is invalid (or terminated or non-existent).

These provisions in Article 16 are complemented by Article 8 of the Qatari Arbitration Law, which mirrors Article 8 of the UNCITRAL Model Law. Article 8 of the

Qatari Arbitration Law requires a Qatari court that is seized of an action subject to an arbitration agreement to refrain from proceeding in the action unless the court concludes that the arbitration agreement is invalid.

When the doctrines of competence-competence and separability are read together, one would expect that an arbitral tribunal would properly determine whether it has jurisdiction over a dispute in the first instance even if the underlying substantive contract is invalid. For example, in the English case of *Fiona Trust & Holding Corporation & Others v. Privalov & Others*, [2007] EWCA Civ. 20, the court held that where the underlying substantive contract was obtained through bribery, the arbitration clause in that contract remained valid and the arbitral tribunal thus maintained jurisdiction to determine its own jurisdiction.

In light of the incorporation of these principles in the Qatari Arbitration Law, one would have expected the Court of Cassation to have upheld the judgments of the Court of First Instance and Court of Appeal. Pursuant to Articles 8 and 16 of the Qatari Arbitration Law, the expected course of action would have been for the Court of Cassation to have referred the parties to arbitration and left it to the arbitral tribunal to determine first whether it had jurisdiction to hear the case and second whether the underlying agreement was valid or void. Pursuant to Article 16(3) of the Qatari Arbitration Law, either party could then have requested the Qatari courts to review the jurisdictional determination by the tribunal, and the determination of the underlying agreement's validity is subject to annulment by the courts pursuant to Article 33(3) of the Qatari Arbitration Law.

Instead, by not giving due regard to the principles of competence-competence and separability, the Court of Cassation gave itself jurisdiction to consider the validity of the underlying substantive contract in the first instance. In doing so, the Court of Cassation took an intrusive approach that is inconsistent with these two fundamental principles set forth in the new Qatari Arbitration Law.

One particular concern that this approach raises is that parties who wish to avoid arbitration in Qatar will seek to put forth arguments based on public policy (which would apparently include any case in which it is alleged that a contract is invalid based on the Court of Cassation's extraordinarily broad interpretation of public policy) in order to go directly to the courts to have them rule on the substantive merits of a claim. Accordingly, the Court of Cassation's linkage of the substantive validity of the contract to the validity of the arbitration clause (and thus the

jurisdiction of the arbitral tribunal) is cause for concern.

It is still too soon to tell whether such an approach will be followed and maintained by the Court of Cassation and other Qatari courts. Since Qatar does not recognize the doctrine of binding precedent, this judgment may prove to be an outlier and future court cases may be more in tune with the principles of competence-competence and separability as set forth in the new Qatari Arbitration Law. What the judgment does tell us, however, is that the new Qatari Arbitration Law has not cleared up the fog blurring the balance between the powers of the arbitral tribunal and the courts in Qatar.